Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

NEW JERSEY TRANSIT POLICEMEN'S BENEVOLENT ASSOCIATION, LOCAL 304
Petitioner,

v.

NEW JERSEY TRANSIT CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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April 27, 1987

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QUESTION PRESENTED

Respondent is a state-owned rail carrier removed from coverage of the Interstate Commerce Act by 49 U.S.C. § 10504. The question presented is whether a "savings" clause appended to that provision was properly interpreted to provide respondent with an exemption from the overtime requirements of the Fair Labor Standards Act even though it would not otherwise have qualified for the exemption as a rail carrier "subject to the provisions of Part I of the Interstate Commerce Act."

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioner New Jersey Transit Policemen's Benevolent Association respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit, entered in the above captioned proceedings on December 2, 1986.

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit is reported at 806 F.2d 451 and is reprinted in the appendix hereto, p. 1a, *infra.*

The Order of the United States District Court for the District of New Jersey (Debevoise, D.J.) has not been

reported. It is reprinted in the appendix hereto, p. 26a, *infra.*

JURISDICTION

Invoking federal jurisdiction under Section 17 of the FLSA, 29 U.S.C. § 217, the petitioner brought this suit in the District of New Jersey. On November 12, 1986, the District Court denied respondent's motion to dismiss or for summary judgment and for other relief. *See* p. 47a, *infra.*

On respondent's appeal, the Third Circuit on December 2, 1986 entered judgment and an opinion reversing the District Court's order and directing that petitioner's complaint be dismissed. *See* pp. 1a, 50a, *infra.*

Petitioner filed a petition for rehearing on December 19, 1986. The Third Circuit denied the petition on January 27, 1987. *See* p. 49a, *infra.* The jurisdiction of this Court to review the judgment of the Third Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

A. Interstate Commerce Act, 49 U.S.C. § 10101, *et seq.*

§ 10504. Exempt rail mass transportation

(a) In this section—

(1) "local public body"—

(A) has the same meaning given that term by section 1608(c)(2) of this title; and

(B) includes a person or entity that contracts with the local public body to provide transportation services.

(2) "rail mass transportation" means transportation services described in section 1608(c)(5) of this title that are provided by rail.

(b) The Interstate Commerce Commission does not have jurisdiction under this subtitle over rail mass transportation provided by a local public body if—

(1) the Commission would have jurisdiction but for this section; and

(2) the fares of the local public body, or its authority to apply to the Commission for changes in those fares, is subject to the approval or disapproval of the chief executive officer of the State in which the transportation is provided.

(c) Notwithstanding subsection (b) of this section, a local public body, described in subsection (b), is subject to applicable laws of the United States related to—

(1) safety;

(2) the representation of employees for collective bargaining; and

(3) employment retirement, annuity, and unemployment systems or other provisions related to dealings between employees and employers.

B. Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 201, *et seq.*

§ 207. Maximum hours

(a) (1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

§ 213 Exemptions

. . .

(b) The provisions of section [207] shall not apply with respect to—

. . .

(2) any employee of an employer engaged in the operation of a common carrier by rail and subject to the provisions of part I of the Interstate Commerce Act. . .

STATEMENT OF THE CASE

Petitioner is a labor organization representing police officers employed by respondent, New Jersey Transit Corporation ("NJ Transit"). NJ Transit is an entity created by the State of New Jersey to operate local mass transportation systems, including the regional commuter railroad by which the police officers represented by petitioner are employed.

Because these police officers are frequently required to perform extra duties beyond their assigned weekly forty-hour shifts, for which they are compensated only at their regular rate of pay, petitioner sued NJ Transit for failure to comply with the overtime provisions of the Fair Labor Standards Act, 29 U.S.C. § 207, which require payment of one and a half times an employee's regular rate of pay for hours in excess of forty per week.

NJ Transit moved to dismiss on the ground that its employees come within one of the FLSA's overtime exemptions, 29 U.S.C. § 213(b)(2), which applies to employees of a railroad which is subject to the provisions of the Interstate Commerce Act. NJ Transit concedes, however, that it is *not* subject to the provisions of the Interstate Commerce Act. Public bodies conducting commuter rail operations whose fares are, like NJ Transit's, subject to approval by the chief executive officer of their state, were removed from ICA jurisdiction by a provision originally contained in § 804 of the Railroad Re-

vitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, and subsequently revised and codified as 49 U.S.C. § 10504.[1]

Despite the fact that it does not meet the FLSA's stated condition for exemption, NJ Transit argued that a savings clause included in the foregoing legislation, which provides that a carrier thus removed from ICA jurisdiction continues to be "subject to applicable laws of the United States relating to . . . safety . . . collective bargaining . . . retirement, annuity, and unemployment systems or other provisions related to dealings between employees and employers" (49 U.S.C. § 10504(c)), operates to preserve its exemption from FLSA's overtime requirements.

The district court rejected this contention. The court noted that the clause was designed to maintain the application of a number of statutes which subject rail carriers to affirmative obligations and which define their coverage by reference to the jurisdiction of the ICA. These include the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, the Railroad Retirement Act, 45 U.S.C. § 231, *et seq.*, and the Railroad Unemployment Insurance Act, 45 U.S.C. § 351, *et seq.* The district court concluded, however, "that a careful reading of Section 10504(c) and its predecessor indicates that it does not refer to the statutory exemption of the FLSA" (p. 34a, *infra*), and therefore denied NJ Transit's motion to dismiss.

Upon NJ Transit's interlocutory appeal, the Third Circuit, by a two to one decision, reversed. The majority recognized that the "subject to" language of the savings clause is unsuitable for purposes of describing an employer's enjoyment of an FLSA exemption. It reasoned,

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[1] As originally enacted, the provision removed all publicly-operated commuter railroads from ICA jurisdiction. Subsequent legislation narrowed this exclusion to apply only to those of such carriers whose fares are subject to approval by the state governor. *See* p. 9, *infra*, and note 2.

however, that this "semantic problem" could be avoided by restating the issue as being whether the "Congressional intent was that 'applicable laws' *include* the FLSA's overtime requirements, or continue, as had been the case for the preceding four decades to *exclude* those provisions" (p. 6a, *infra*, emphasis in original).

In deciding that the savings clause was intended to maintain the status quo with respect to application of the FLSA, the majority relied on two factors. One was the absence of legislative history to suggest that Congress believed it was effecting any change by adopting what is now Section 10504, other than to narrow the ICC's jurisdiction. The other factor was the majority's inability to discern any reason why Congress might have chosen to fashion a "hybrid scheme" whereby publicly-operated commuter rail carriers whose fares are controlled by a state's chief executive are subject to both the special railroad employment statutes and the FLSA's overtime rules, while other publicly-operated commuter rail carriers whose fares are controlled by the ICC remain exempt from the overtime requirements. (p. 10a, *infra*).

On the basis of this analysis, the majority ruled that NJ Transit was entitled to claim the overtime exemption and that the district court erred in denying its motion to dismiss.

In a vigorous dissent, Judge Garth stated four bases for his disagreement with the majority (pp. 15a-16a, *infra*):

> First, this analysis is contrary to our court's accepted approach to the interpretation of exemptions from FLSA overtime pay requirements. Second, it cannot be harmonized with the legislative history of part 1 of the ICA. Third, this line of reasoning conflicts with the result that would be reached through ordinary principles of statutory construction. Finally, not only does the majority distort the plain language of § 10504(c), but also it errs in attribut-

ing to § 10504(c) the obligations to which NJT is subject and which originate in other statutes.

The dissent emphasized that the "plain meaning" of the legislation requires that all commuter rail carriers pay overtime if the carrier has taken advantage of not being rate-regulated by the ICC, and that nowhere in the history of the 1976 legislation was it intimated that an exemption from overtime requirements was to be retained by commuter rail carriers which received the benefit of local rate autonomy (pp. 17a, 22a-23a, *infra*).

REASONS FOR GRANTING THE WRIT

The decision below, in extending an FLSA overtime exemption to an employer which admittedly does not meet the express condition for such exemption, conflicts with decisions of this Court prescribing the narrow construction to be given FLSA exemptions and their limitation to those "plainly and unmistakably within their terms and spirit." *Phillips* v. *Walling*, 324 U.S. 490, 493 (1945). The reasoning by which this result was reached is also contrary to other controlling principles of statutory construction and disregards applicable legislative history. The issue presented is of substantial importance, in view of the number of publicly-operated railroads which, on the basis of this precedent, may seek to avail themselves of this same exemption.

1. The decision below conflicts in its result and reasoning with the rule which this Court has clearly mandated for the application of exemptions from the FLSA. As the Court first stated in *Phillips* v. *Walling*, *supra*, 324 U.S. at 493:

> Any exemption from [this] humanitarian and remedial legislation must . . . be narrowly construed, giving due regard to the plain meaning of statutory language and to the intent of Congress. To extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse

the interpretative process and to frustrate the announced will of the people.

This emphasis upon the narrow construction of FLSA exemptions and their limitation to those "plainly and unmistakably" within their terms and spirit has been consistently reaffirmed in subsequent FLSA exemption cases. *Arnold* v. *Kanowsky*, 361 U.S. 388, 392 (1960); *Mitchell* v. *Kentucky Finance Co.*, 359 U.S. 290, 295 (1959); *Idaho Sheet Metal Co.* v. *Wirtz*, 383 U.S. 190 (1966).

The conflict of the decision below with this established principle could not be more apparent, for it upheld the FLSA exemption claim of an employer who admittedly does not meet the one explicit condition for the exemption—that it be a rail carrier subject to the provisions the Interstate Commerce Act.

To reach this result the majority of the court below relied upon a savings clause contained in the 1976 legislation which removed ICA controls from publicly-owned commuter railroads. However, neither the language of the savings clause nor the court's speculations concerning its intent justified the court's departure from the well-settled rule concerning the application of FLSA exemptions.

In the first place, the language of the savings clause supports the decision below only if the words "subject to applicable laws"—which clearly refer to such statutes as the Railway Labor Act and the Railroad Retirement Act —can also be reasonably construed as having reference to an *exemption* from the FLSA. Even the majority below balked at such a construction, recognizing "the semantic problem of being 'subject to' an exemption," and stating that it would look beyond "[t]extual parsing" to discern Congressional intent (pp. 6a-7a, *infra*).

In concluding that, notwithstanding the difficulties presented by its language, the savings clause must have been intended to preserve the status quo with respect to

the FLSA—just as it did with respect to the clearly applicable regulatory statutes to which it was directed—the majority of the court below emphasized that it could not see "any reason why Congress might have chosen to fashion such a hybrid scheme" under which commuter rail lines whose rates are subject to a governor's control are subject to FLSA's overtime provisions whereas others remaining within the control of the ICC retain the overtime exemption (p. 10a, *infra*).

In giving critical weight to its own doubts that Congress could have intended such a "hybrid scheme," the majority of the court below overlooked the actual sequence of legislative events. As previously noted, Section 10504, as adopted in its original form on February 5, 1976 by the Railroad Revitalization and Regulatory Reform Act, freed *all* publicly owned commuter rail lines from ICA regulation, without regard to chief executive approval of fares, *and* contained a savings clause which included the same words as are now in issue. Thus, when Congress first acted, it fashioned no "hybrid scheme" whatsoever. All such commuter rail lines were removed from ICA jurisdiction, and all were accordingly subject to FLSA's overtime provisions. In subsequent legislation, the Rail Transportation Improvement Act, enacted October 19, 1976, Congress withdrew a portion of its prior grant of freedom from ICA jurisdiction, specifying that it would apply only to those carriers with governor-controlled fare structures.[2] That such later action may

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[2] The original enactment was contained in Section 804 of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, which added a new subsection (j) to Section 304 of the Regional Rail Reorganization Act of 1973, Pub. L. No. 93-236, reading in pertinent part as follows:

> (j) Exemption.—(1) No local public body which provides mass transportation services and which is otherwise subject to the Interstate Commerce Act shall, with respect to the provision of such services, be subject to the Interstate Commerce Act . . . except that any such local public body shall continue to be subject to applicable federal laws pertaining to (A)

have created the "hybrid scheme" which so troubled the majority of the court below surely does not justify a reinterpretation of the savings clause language based upon an event which occurred after its adoption as part of the initial legislation.

2. Even if such "hybrid scheme" had existed from the outset, it was not the province of the court below to disregard the explicit language of FLSA's exemption provision on the assumption that Congress could not reasonably have intended to subject only some publicly-operated commuter railroads to both the special railroad employment statutes and the FLSA overtime rules. As this Court has held, where statutes "are 'capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.'" *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1018 (1984); *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 133-34(1974), quoting *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974).

Here, of course, there was no legislative history to the contrary—indeed, as the dissent pointed out, the record "is utterly barren of proof of Congressional intent to exempt carriers such as NJT from paying overtime rates" (p. 17a, *infra*). It is clear that a decision holding that NJ Transit was no longer within the FLSA exemption because of its removal from ICA jurisdiction would have served the purposes of both the FLSA and of the savings clause.

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safety, (B) the representation of employees for purposes of collective bargaining, and (C) employment retirement, annuity, and unemployment systems or any other provision pertaining to dealings between employees and employers.

Section 206 of the Rail Transportation Improvement Act, Pub. L. No. 94-555, revised the foregoing provision, *inter alia*, to make the exemption from ICA jurisdiction depend upon whether "the interstate fares . . . of such local public body is subject to approval or disapproval by a Governor of any state in which it provides services."

Moreover, in refusing to accept a result that extended the FLSA's overtime provisions to only a portion of the publicly-operated commuter rail industry, the majority of the court below ignored the entire process by which Congress, since 1961, has gradually extended the FLSA to various segments of public employment—a process described in some detail in *Garcia* v. *San Antonio Metropolitan Transit Auth.*, 469 U.S. 528, 533-34 (1985). This process included the provision, in 1974, for the progressive repeal of what then remained of FLSA overtime exemptions for non-rail mass transit employees. *Id.*

As this Court also pointed out in *Garcia*, the States have been active participants in the political process by which Congress has extended Federal regulation in certain areas and withdrawn or withheld such regulation in others, and the influence of the States has been clearly reflected both in the type of exemptions and in the benefits that have often accompanied extension of Federal regulations. *Id.* at 553-54. The Court's comments with respect to the give and take of the regulatory relationship between the states and the federal government—in the context of FLSA coverage of publicly-operated bus systems—is instructive here (*Id.* at 555):

> In these cases, the status of public mass transit simply underscores the extent to which the structural protections of the Constitution insulate the States from federally imposed burdens. When Congress first subjected state mass-transit systems to FLSA obligations in 1966, and when it expanded those obligations in 1974, it simultaneously provided extensive funding for state and local mass-transit through UMTA . . . . In short, Congress has not simply placed a financial burden on the shoulders of States and localities that operate mass-transit systems, but has provided substantial countervailing financial assistance as well, assistance that may leave individual mass transit systems better off than they would have been had Congress never intervened at all in the area.

Thus, there was no warrant for the court below to assume that Congress did not intend the FLSA's overtime provisions to apply to those portions of the publicly-operated commuter rail industry which were simultaneously benefitting from being relieved of ICA regulation—particularly when the record so clearly demonstrates that other extensions of FLSA coverage to public employment have regularly been accompanied by trade-offs between federal and state interests.

In the present instance, publicly-operated rail carriers have been given the opportunity to remove themselves from a layer of federal regulation. States need not avail themselves of this opportunity, but those which make this choice should not also be permitted to evade the reach of the FLSA's overtime provisions once they are no longer within the literal terms of its exemption. The dissent below recognized this balancing concept: "New Jersey Transit chose to take advantage of this escape route from its very inception and by doing so, lost the concomitant right to be free from paying overtime rates" (p. 18a, *infra*).

3. The importance of the question here presented, and the unsettling and confusing impact of the decision below, extends well beyond NJ Transit. Some forty-nine publicly-owned railroads are currently operating in this country, located in most of the states, and employing nearly nine thousand employees.[3] Their number has increased considerably since the Court noted the existence of thirty such railroads in *California* v. *Taylor*, 353 U.S. 553, 563-64 (1957), and the number continues to rise. Each of these carriers may choose to escape regulation under the Interstate Commerce Act by structuring its fare approval system to satisfy the exemption conditions of Section 10504(b), and in each such instance, should this case be unreviewed, the application of the

[3] *See Profiles of 475 Local and Regional Railroads*, Association of American Railroads, June 1986.

FLSA's Section 213(b)(2), limiting the exemption to carriers "subject to the provisions of . . . the Interstate Commerce Act," will be an unsettled issue productive of further litigation in various regions of the country.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

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April 27, 1987

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 86-5259

N.J. TRANSIT POLICEMEN'S BENEVOLENT ASSOCIATION LOCAL 304

vs.

NEW JERSEY TRANSIT CORPORATION,
Appellant

On Appeal from the United States District Court
For the District of New Jersey-Newark
(C.A. No. 85-2420)

Argued September 16, 1986

BEFORE: ADAMS and STAPLETON,
Circuit Judges,
and GARTH, *Senior Circuit Judge*

(Opinion Filed December 2, 1986)

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OPINION OF THE COURT

STAPLETON, *Circuit Judge.*

This case presents a question of statutory interpretation. Did a savings clause subjecting New Jersey Transit Corporation (N.J. Transit) to "applicable laws of the United States related to . . . dealings between employees and employers" preserve its exemption from the overtime rules of the Fair Labor Standards Act (FLSA)? The district court found, based on the "plain language" of the statute, that it did not. We conclude that the statute, when read with an eye to its purpose and to the regulatory scheme in existence at the time of its enactment, evidences an intent to preserve the FLSA overtime exemption.

I.

N.J. Transit, an instrumentality of the State of New Jersey that operates commuter rail service, was sued by New Jersey Transit Policemen's Benevolent Association, Local 304 (Local 304), for failure to comply with the provision of the Fair Labor Standards Act that requires employers to pay employees one and one-half times their regular wage for hours worked in excess of forty per week. 29 U.S.C. § 207(a) (1982). N.J. Transit moved to dismiss this claim, asserting that its employees fell within one of the categorical exemptions from the overtime rules listed in Section 213(b). The relevant provision exempts:

> any employee of an employer engaged in the operation of a common carrier by rail and subject to the provisions of subchapter I of chapter 105 of title 49 [Part I of the Interstate Commerce Act]

29 U.S.C. § 213(b) (2) (1982).

In response to the motion to dismiss, Local 304 pointed out that N.J. Transit was not currently subject to the provisions of Interstate Commerce Act (ICA) and argued that it was accordingly not entitled to the exemption provided by Section 213(b) (2) of the FLSA. While N.J. Transit acknowledged that it was not now subject to Interstate Commerce Commission (ICC) regulation, it insisted that the 1976 statute removing commuter railroads such as N.J. Transit from the jurisdiction of the ICC included a savings clause which preserved their overtime exemption. This 1976 statute, now codified as amended at 49 U.S.C. § 10504, reads in relevant part as follows:

> (b) The Interstate Commerce Commission does not have jurisdiction under this subtitle over rail mass transportation provided by a local public body if—

(1) the Commission would have jurisdiction but for this section; and

(2) the fares of the local public body, or its authority to apply to the Commission for changes in those fares, is subject to the approval or disapproval of the chief executive officer of the State in which the transportation is provided.

(c) Notwithstanding subsection (b) of this section, a local body, described in subsection (b), is subject to applicable laws of the United States related to—

(1) safety;

(2) the representation of employees for collective bargaining; and

(3) employment retirement, annuity, and unemployment systems or other provisions related to dealings between employees and employers.

49 U.S.C. § 10504 (1982). The parties agree that N.J. Transit satisfies the conditions for the Section 10504(b) exemption from ICC regulation. They disagree only with respect to the effect of the Section 10504(c) savings clause.

The district court denied N.J. Transit's motion to dismiss holding that the Section 10504(c) savings clause did not preserve the Section 213(b)(2) overtime exemption. It also determined that the order denying N.J. Transit's motion to dismiss involved "a controlling question of law as to which there is substantial ground for difference of opinion and [that] an immediate appeal from the order may advance the ultimate termination of the litigation." App. at 4. This court granted N.J. Transit's petition for appeal of the statutory construction question pursuant to 28 U.S.C. § 1292(b). Accordingly, the only issue before us is whether the Section

213(b)(2) overtime exemption is preserved by the Section 10504(c) savings clause. Our review of questions of statutory interpretation is plenary.

II.

"Where, as here, resolution of a question of federal law turns on a statute and the intention of Congress, we look first to the statutory language and then to the legislative history if statutory language is unclear." *Blum v. Stenson*, 465 U.S. 886, 896 (1984). In seeking to discern Congressional intent from the legislative text, a court must be mindful of the statute's object and policy and must read the disputed provision in the context of the entire statute and the provisions of related statutes. *Richards v. United States*, 369 U.S. 1, 11 (1962); *Commissioner of Internal Revenue v. Engle*, 464 U.S. 206, 217 (1984); *Kokoszka v. Belford*, 417 U.S. 642, 650 (1974).

A. *The Text*

The relevant provision states that, notwithstanding Section 10504(b), commuter railroads like N.J. Transit are "subject to applicable laws of the United States related to—(1) safety; (2) the representation of employees for collective bargaining; and (3) employment retirement, annuity, and unemployment systems or other provisions related to dealings between employees and employers." 49 U.S.C. § 10504(c) (1982). The district court read "dealings" in the last clause to mean "business interactions," which it found to include negotiations over collective bargaining agreements but not rules concerning wages or hours. App. at 41. We disagree. The use of the phrase "other provisions related to dealings between employees and employers" in conjunction with the preceding references to safety, labor negotiations, retirement, and unemployment implies that Congress had a broad conception of "dealings." Moreover, the district

court's equation of dealings with negotiations would render the final clause of the provision redundant, given the language of Section 10504(c)(2) preserving laws "related to . . . the representation of employees for collective bargaining," a reference to the Railway Labor Act. 45 U.S.C. § 151, *et seq.* In short, a law concerning overtime pay requirements is, on its face, a provision relating to dealings, or business interactions, between employees and employers.

A more plausible argument is that the phrase "subject to applicable laws of the United States" refers only to affirmative regulation imposed by federal law and not to exemptions from such statutory regulation. This argument was apparently adopted by the district court when it found that " 'applicable laws of the United States' refers to broad statutory schemes . . . not to narrowly tailored specific exemptions from statutory schemes." App. at 16. The *amicus curiae* makes the same argument in somewhat different terms when it asserts that the phrase "subject to" is inconsistent with the preservation of a regulatory exemption since a railroad cannot be "subject to" a beneficial exception. While we find this parsing of the legislative text plausible, it is not compelling. The point is not whether this somewhat inartfully drafted statute means to make N.J. Transit "subject to" a beneficial exemption. The statute makes N.J. Transit "subject to applicable laws" and the question then is whether Section 207(a) of the FLSA is an "applicable law" or not. If the Section 207(a) overtime provisions are meant not to be applicable because of the exemption, then N.J. Transit is simply not "subject to" *the overtime requirements*; thus, the semantic problem of being "subject to" an exemption would appear to be off the mark. The real issue, then, is whether the Congressional intent was that "applicable laws" *include* the FLSA overtime requirements, or continue, as had been the case for the preceding four decades, to *exclude* those provisions.

Textual parsing, especially here, is not alone an indisputable indication of Congressional intent. Rather, we believe this textual analysis must be tested by reference to the purpose of the statute and the legislative history. When the savings clause is read against this background, it becomes clear that it was intended to maintain the status quo in all of the areas referred to in subsection (c) and that this result can be achieved only by construing it to preserve the overtime exemption as well as coverage by the railroad employment laws.

B. *The Statutory Purpose*

Initially, it is important to put the savings clause of Section 10504 in the context of the law as it existed immediately before its adoption by Congress. Historically, Congress has elected to regulate the relationship of railroad workers with their employers in a series of statutes independent of those which apply to other industrial workers and their employers. Thus, the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, rather than the Labor Management Relations Act, 29 U.S.C. § 141, *et seq.*, governs labor-management relations in the railroad industry. Other examples include the Railroad Retirement Tax Act, 45 U.S.C. § 3231, *et seq.*, the Railroad Retirement Act of 1974, 45 U.S.C. § 231, *et seq.*, the Railroad Unemployment Insurance Act, 45 U.S.C. § 351, *et seq.*, the Federal Employee Liability Act, 45 U.S.C. § 54, and the Hours of Service Law, 45 U.S.C. § 61. All of these statutes were in force in 1976 immediately prior to the passage of Section 10504. The 1976 regulatory environment for railroads also included Section 213(b)(2) of the FLSA which exempted railroad workers from the overtime provisions of that act. The Railway Labor Act, 45 U.S.C. § 151, the Railroad Retirement Tax Act, 26 U.S.C. § 3231(g), the Railroad Retirement Act, 45 U.S.C. § 231(a)(1)(i), the Railroad Unemployment Insurance Act, 45 U.S.C. § 351(b), and the Section 213(b)(2) overtime exemption

each defined their applicability by reference to the Interstate Commerce Act.

The exemption from the overtime provisions of the FLSA was granted to railroads in recognition of the nature of railroad operations and the fact that such operations may result in irregular hours for railroad workers. *See Southland Gasoline Co. v. Bayley*, 319 U.S. 44, 48-49 (1943). The reference to the ICA was made solely for the purpose of identifying the workers to be covered by the exemption and not because the ICA provided an alternative scheme for regulating overtime compensation. This is clear from the fact that the scope of the exemption, as originally proposed, was defined by reference to employees covered by the Hours of Service Act and reference to the ICA was substituted by amendment in order to make sure that all types of railroad workers were included in the exemption.[1] *See Keele v. Union Pacific Railroad Co.*, 78 F. Supp. 678 (S.D.Cal. 1948) and the legislative history detailed therein.

It is undisputed that commuter rail lines, such as the service now operated by N.J. Transit, were subject to this special railroad regulatory scheme—including ICC regulation, coverage by the railroad employment statutes,

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[1] The dissent argues that exemptions from the FLSA should be narrowly construed. There is, however, no dispute as to the meaning of § 213(b)(2). The pertinent question is whether § 10504(c) should be construed to provide for the continued application of § 213(b)(2) notwithstanding the change in ICC jurisdiction enacted in § 10504(b).

Moreover, unlike the dissent, we believe the Supreme Court's decision in *Garcia v. San Antonio Metropolitan Transit Authority*, 105 S.Ct. 1005 (1985), is unhelpful in resolving this dispute. *Garcia* involved an intrastate bus operator, not a railroad. The one-time exemption from the FLSA discussed in *Garcia*, namely 29 U.S.C. § 213(a)(9) [repealed], related to employees of local mass transit operators. The overtime exemption applicable to railroad employees under § 213(b)(2) was not at issue.

and exemption from the overtime provisions of the FLSA —prior to the passage of Section 10504 in 1976.

Section 10504, as the district court recognized, represents a Congressional judgment that ICC regulation of publicly-operated commuter rail lines is unnecessary when their fares are subject to control by the chief executive of a state. Thus, the purpose of Section 10504 was to free this subclass of railroads from redundant rate control mechanisms by removing it from the jurisdiction of the ICC. The issue presented by this case is whether Section 10504 also reflects a Congressional intent to otherwise alter the regulatory environment in which this subclass of railroads had been operating prior to its passage. We find no evidence of such an intent. To the contrary, when Section 10504 is read in the context of the pre-existing law, we believe it evidences an intent to preserve the status quo in all of the areas subsumed under Section 10504(c), including the area of overtime compensation.

The Section 10504(c) savings provisions is necessary because, as we have seen, a number of statutes regulating the activities of railroads define their applicability by reference to the Interstate Commerce Act. The reference in subsection (c)(2) to "the representation of employees for collective bargaining," for example, clearly preserves the regulation afforded by the Railway Labor Act. The references to "retirement, annuity, and unemployment systems" preserve the regulation provided by the Railroad Retirement Tax Act, the Railroad Retirement Act of 1974, and the Railroad Unemployment Insurance Act. Similarly, we believe the sweeping reference to "other provisions related to dealings between employees and employers" reflects a Congressional intent to preserve the regulatory status quo with respect to other statutes in the area of employment relations whose ap-

plicability might have been altered by changing the ICC's jurisdiction.[2]

In this context, we think it highly unlikely that Congress used the phrase "subject to applicable laws of the United States" to indicate that only statutes affirmatively regulating railroad activity, and not exemptions, were to be preserved. The district court's reading of this phrase necessarily attributes to Congress a decision to impose a hybrid and unique regulatory environment on this small subclass of railroads, one involving both the special railroad employment statutes and the FLSA overtime rules. Yet, neither Local 304 nor the *amicus curiae* has suggested any reason why Congress might have chosen to fashion such a hybrid scheme applicable only to publicly-operated commuter lines whose fares are controlled by the chief executive of their states. While the statutory definition of this subclass of railroad provides a ready explanation as to why Congress might decide to remove them from ICC jurisdiction, there is nothing about the subclass which would suggest a rationale for changing the laws governing their employee relations. In particular, we can perceive no reason why Congress might wish commuter rail lines whose rates are controlled in this manner to be subject to the overtime provisions of the FLSA while other commuter rail lines remain entitled to the

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[2] The dissent argues that N.J. Transit does not qualify for the § 213(b)(2) overtime exemption unless we find that § 10504(c) saved Part I of the ICA with respect to N.J. Transit. While we agree with the dissent that it would be absurd to find that § 10504(c) preserved the ICC regulation explicitly halted in § 10504(b), we do not agree that such a finding is necessary to find that N.J. Transit continues to qualify for the overtime exemption. We note that ICC jurisdiction determines the applicability of the Railway Labor Act, the Railroad Retirement Act, the Railroad Retirement Tax Act, and the Railroad Unemployment Insurance Act. Judge Garth's formulation would necessarily lead to the conclusion that these laws, in addition to the overtime exemption, no longer apply to N.J. Transit. Under this analysis, we would perceive no function that is served by the savings clause.

Section 213(b)(2) exemption. In short, consideration of the purpose of Section 10504 and the regulatory context in which it was enacted strongly suggests that the savings clause was intended to preserve the status quo across the entire spectrum of railroad employment regulation. We turn now to the legislative history.

C. *The Legislative History.*

The ICA exemption now contained in Section 10504 was originally enacted as a part of the Railroad Revitalization and Regulatory Reform Act of 1976. Pub. L. No. 94-210, § 804, 90 Stat. 31, 139 (1976). The exemption in this statute was broader than the current law, exempting from ICC regulation all commuter passenger service provided by local public bodies. The savings clause was contained in this first effort. Later in the same year, Congress, as a part of the Rail Transportation Improvement Act, narrowed the ICA exemption to railroad commuter passenger service provided by local public bodies the fares of which were subject to control by the chief executive officer of the state. Pub. L. No. 94-555, § 206, 90 Stat. 2613, 2621 (1976). The legislative histories of these Acts comment only briefly on Section 10504. In neither instance is anything said or done which suggests that Congress believed it was effecting any change other than a narrowing of the ICC's jurisdiction.[3]

When Congress abandons previously articulated policies, one "would normally expect some expression by Congress that such results are intended." *United States v. United Continental Tuna Corp.*, 425 U.S. 164, 169 (1976). Finding no such expression here in the legislative history and further finding in the statutory text a

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[3] *See, e.g.*, S. Conf. Rep. No. 595, 94th Cong., 2nd Sess. (on Pub. L. No. 94-210), *reprinted in* 1976 U.S. Code Cong. & Ad. News, 148, 237; House Conf. Rep. No. 1743, 94th Cong., 2nd Sess. (on Pub. L. No. 94-555), *reprinted in* 1976 U.S. Code Cong. & Ad. News 5846, 5863.

strong indication that Congress intended to maintain the status quo in the area of employment relations, we hold that Section 10504 does not deprive N.J. Transit of its exemption from the overtime provisions of the FLSA.

III.

In response to the question certified by the district court, we conclude that the Section 213(b)(2) exemption from the overtime provisions of the FLSA was preserved by the Section 10504(c) savings clause. It follows that the district court erred in denying N.J. Transit's motion for dismissal of the overtime claim. We therefore vacate the order denying N.J. Transit's motion so that the district court may enter an order consistent with this opinion. Each party will bear its own costs.

GARTH, *Circuit Judge*, dissenting:

The Policemen's Benevolent Association (PBA) represents police employed by the New Jersey Transit Corporation (NJT) who on occasion work overtime by testifying at mandatory court hearings, by receiving special police training, and by attending briefings at roll calls. The PBA argues that 29 U.S.C. § 207, the Fair Labor Standards Act (FLSA), entitles its members who work overtime at these and other tasks to overtime rates of compensation instead of "straight pay." NJT, on the other hand, claims that it need not pay overtime, because NJT comes within the terms of 29 U.S.C. § 213(b)(2), which exempts certain rail carriers from the operation of § 207.

The majority agrees with NJT and holds that NJT is excluded from paying overtime rates by virtue of a statutory exemption from paying such overtime for "any employee of an employer engaged in the operation of a common carrier by rail and *subject to the provisions of Part I of the Interstate Commerce Act*" (ICA), 29 U.S.C. § 213(b)(2) (emphasis added). Part I of the ICA contains the rate regulatory provisions of the Act.

In my view, NJT is not exempt from the overtime rate requirements prescribed by the Fair Labor Standards Act, as it cannot be considered "subject to" the provisions of Part I of the ICA, or the catch-all clause of 49 U.S.C. § 10504(c)(3). Consequently, I am satisfied that NJT must adhere to the requirements of 29 U.S.C. § 207 and pay overtime rates for overtime work. Accordingly, I must dissent.

I.

New Jersey Transit concedes that it was exempted from the fare regulations provided in Part I of the ICA because its fares are subject not to ICA approval but to approval by the Governor of New Jersey. Appellant's brief at 8; 49 U.S.C. § 10504(b). Because the Commis-

sion has no jurisdiction over NJT owing to this circumstance, NJT cannot share in the overtime exemption [29 U.S.C. § 213(b)(2)] given to those rail carriers who are regulated by ICA. This immunity from ICA fare regulation, and therefore ICA jurisdiction, represents a benefit or privilege granted by Congress to NJT. See brief of Amicus Curiae at 5; *see also* infra at 9-10.

NJT asserts, however, that an obscure clause found within an ambiguous proviso of 49 U.S.C. § 10504(c), which itself is found within a subsidiary provision of that statute—49 U.S.C. § 10504(c)(3)—restores to NJT the overtime exemption which it otherwise would have lost because it was no longer under ICA jurisdiction. 49 U.S.C. § 10504(c) provides in full:

> (c) Notwithstanding subsection (b) of this section, a *local public body, described in subsection (b), is subject to applicable laws of the* United States *related to*—
>
> (1) safety;
>
> (2) the representation of employees for collective bargaining; and
>
> (3) employment retirement, annuity, and employment systems or other *provisions related to dealings between employees and employers.*

NJT relies upon so much of the statute as I have underlined above and which reads: ". . . a local public body, described in subsection (b), is subject to applicable laws related to . . . provisions related to dealings between employees and employers." Thus NJT, to succeed, must first establish that the "applicable law" to which it is subject is the Interstate Commerce Act, Part I, which regulates rates. Secondly, it must establish that the "provision related to dealings between employees and employers" "subjects" NJT to 29 U.S.C. § 213(b)(2),

and thus would free NJT from paying overtime rates for overtime work. Without even consideration of the tortured construction of 49 U.S.C. § 10504(c)(3)—which NJT must urge in order to give any semblance to its argument—it is evident that NJT cannot bring itself within the overtime exemption statute because Part I of ICA cannot be an "applicable law" insofar as NJT is concerned.[1]

NJT and the majority opinion maintain that owing to § 10504(c), NJT has been subjected to the terms of the Railroad Labor Act; subjected to the terms of the Railroad Retirement Act; subjected to the laws of the Pension System; subjected to the Federal Employers Liability Act; and subjected to other Federal laws which regulate the nationwide railroad system. App. at 61-2. They more significantly contend that § 10504(c) "subjects" NJT to the "other provisions related to dealings between employees and employers," or, in the context of this case, to the exemption from overtime pay that ICC regulated carriers enjoy. Appellant's Brief at 20.

I cannot agree, for at least four reasons. First, this analysis is contrary to our court's accepted approach to the interpretation of exemptions from FLSA overtime pay requirements. Second, it cannot be harmonized with the legislative history of Part I of the ICA. Third, this line of reasoning conflicts with the result that would be reached through ordinary principles of statutory construction. Finally, not only does the majority distort the

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[1] NJT would have us read § 10504(c) to the effect that it, NJT, is subject to the exemption statute, § 213(b)(2), by virtue of § 10504(b)(3)'s "other provisions related to dealings between employees and employers." Not only does such a construction strain the plain meaning of the statute, but from the standpoint of sheer grammatical construction, the phrasing of § 10504(c) in terms of "subject to," is awkward and is obviously not intended to reach the result for which NJT contends.

plain language of § 10504(c), but also it errs in attributing to § 10504(c) the obligations to which NJT is subject and which originate in other statutes.

II.

Recognizing a need for a national wage and overtime policy, there has been a congressional trend, recognized by the Supreme Court in *Garcia v. San Antonio Metropolitan Transit Authority*, 105 S. Ct. 1005 (1985), to expand, rather than to contract the protections extended to workers through the FLSA overtime provision. In *Garcia*, the Court observed that Congress has been ever more inclusive in applying FLSA to mass transit authorities:

> When the FLSA was enacted in 1938, its wage and overtime provisions did not apply to local mass-transit employees or, indeed, to employees of state and local governments. In 1961, Congress extended minimum-wage coverage to employees of any private mass-transit carrier whose annual gross revenue was not less than $1 million. Five years later, Congress extended FLSA coverage to state and local-government employees for the first time by withdrawing the minimum-wage and overtime exemptions from public hospitals, schools, and mass-transit carriers whose rates and services were subject to state regulation. At the same time, Congress eliminated the overtime exemption for all mass-transit employees other than drivers, operators, and conductors. . . . The FLSA obligations of public mass-transit systems like [San Antonio's] were expanded in 1974 when Congress provided for the progressive repeal of the surviving overtime exemption for mass-transit employees. Congress simultaneously brought the States and their subdivisions further within the ambit of the FLSA by extending FLSA

> coverage to virtually all state and local-government employees.

Garcia, 105 S. Ct. at 1008-9 (1985) (citations omitted).

Both in this court and elsewhere, exceptions to the overtime requirements of the FLSA are to be read narrowly. "Exemptions from the Fair Labor Standards Act are to be narrowly construed against the employer. The burden of proof is on the employer to establish an exemption." *Guthrie v. Lady Jane Collieries, Inc.*, 722 F.2d 1143 (3d Cir. 1983). *See also Idaho Sheet Metal Works, Inc. v. Wirtz*, 383 U.S. 190 (1966); *Paul v. Petroleum Equipment Tools Co.*, 708 F.2d 168 (5th Cir. 1983); *Brennan v. South Davis Community Hospital*, 538 F.2d 859 (9th Cir. 1976); *Brennan v. Southern Productions, Inc.*, 513 F.2d 740 (6th Cir. 1975); *Hodgson v. Elk Garden Corp.*, 482 F.2d 529 (4th Cir. 1973).

The record in this case is utterly barren of proof of Congressional intent to exempt carriers such as NJT from paying overtime rates. Indeed, in Part III of this dissent, I call attention to the legislative history of § 10504, which clearly mandates that NJT's purported exemption from paying overtime rates cannot be revived by any reference to the Interstate Commerce Act as an "applicable law". Thus, to the extent that NJT must carry the burden to establish an exemption, this record reveals that NJT has failed. And to the extent that the majority opinion construes § 10504(c) in such an overly expansive fashion, so as to provide NJT with an exemption from overtime pay where none has been authorized by Congress, that interpretation runs counter to the views that have been expressed by judicial authorities including the Supreme Court.

III.

The majority maintains that it is implausible to suppose that Congress intended to require carriers such as

NJT to pay overtime rates when Congress enacted § 10504, because reference to the Interstate Commerce Act in the Fair Labor Standard Act was "made solely for the purpose of identifying the workers to be covered by the exemption and not because the ICA provided an alternative scheme for regulating overtime compensation." Maj. Op., typescript at 9. In this way, the majority construes the FSLA provision [29 U.S.C. § 213(b)(2)] as one which would ensure that all types of railroad workers were included in the FLSA overtime exemption. I cannot agree with this simplistic argument which has no precedent whatsoever for its support.

It should be noted, first, that *Keele v. Union Pacific R.R.*, 78 F. Supp. 678 (1948), upon which the majority relies, maj. op., typescript at 9, holds that the overtime provision [§ 213(b)(2)] is unambiguous, and precise; it "means exactly what it says: 'The provisions of Section 7 [an earlier codification of the overtime exemption] shall not apply with respect to . . . . (2) any employee of an employer subject to the provisions of Part I [rate regulations] of the Interstate Commerce Act.' There is no exception and there is no limitation." 78 F. Supp. at 682-83. Nothing in *Keele* or any other provision of either statute, or, in the legislative history, can bring NJT, which is *not* under ICA regulations, within the exemption provisions of § 213(b)(2).

Second, while it is true that the unique legislative history of the railroad industry may have fostered a broad overtime exemption from FLSA requirements, it is also true that the peculiar aspects of *commuter* rail systems led to the limited, experimental deregulatory option which Congress, in 1976, provided only to commuter rail systems, thus permitting such systems to escape Interstate Commerce regulations. New Jersey Transit chose to take advantage of this escape route from its very inception, and by doing so, lost the concommitant right to be free from paying overtime rates.

Thus, while ICA fare regulation and exemption from overtime rates was extended to the broad category of rail mass transit, NJT and similar commuter rail lines obtained the possibility of immunity from such fare regulations (a benefit), while suffering whatever burdens (including payment of overtime rates) might ensue. NJT did so in the process of political negotiation that accompanied the passage of the Rail Revitalization and Regulatory Reform Act of 1976, 29 U.S.C. § 10504. *See, e.g.*, 122 Cong. Rec. H35,158 (daily ed. Oct. 1, 1976) (statement of Rep. Skubitz). *See also* Conference Report, Pub. L. 94-555, 5 U.S.C. Code Cong. & Adm. News 5863 (1976).

Contrary to the majority's view, the legislative history of negotiations that occurred prior to the enactment of the 1976 amendments to the Rail Revitalization and Regulatory Reform Act of 1976 suggests that the purpose of § 10504 was not merely to avoid "redundant rate control mechanisms," as the majority claims, maj. op., typescript at 9, but rather, it was part of a larger effort to promote substantive regulatory reform. 122 Cong. Rec. H35,158 (daily ed. Oct. 1, 1976); Conference Report, Pub. L. 94-555, 5 U.S. Code Cong. & Adm. News 5863 (1976). Nowhere in the "reform" legislation is it intimated that an exemption from overtime payments was to be retained by intrastate commuter rail carriers while at the same time the same carriers were to receive local rate autonomy. Thus the reference to "applicable law" found in § 10504(c) must be read as a limitation on the degree of freedom from regulation being conferred, not as a preservation by Congress of the pre-1976 amendment status quo, as the majority claims. *See* Maj. Op., typescript at 7.

Furthermore, the legislative history of § 10504 indicates that the regulatory apparatus of the ICA (Part I, concerned with rates) was not among the "applicable

laws" to which § 10504 refers. The predecessor to § 10504 (c) stated:

> (1) (A) *Except as provided in subparagraph (B) of this paragraph*, no local public body which provides mass transportation services by rail, and which is otherwise subject to the Interstate Commerce Act shall, with respect to the provision of such services, be subject to the Interstate Commerce Act or to rules, regulations, and orders promulgated under such Act, if the interstate fares, or the ability to apply to the Interstate Commerce Commission for changes thereto, of such local public body is subject to approval or disapproval by a Governor of any State in which it provides services.
>
> (B) Any local public body described in subparagraph (A) of this paragraph shall continue to be subject to applicable Federal laws pertaining to (i) safety, (ii) the representation of employees for purposes of collective bargaining, and (iii) employment, retirement, annuity, and unemployment systems or any other provision pertaining to dealings between employees and employers.

45 U.S.C. § 744(j)(1) (emphasis added).

The words in 1(A), "Except as provided in subparagraph (B) of this paragraph "were deleted when Congress reenacted these paragraphs as the present § 10504. The historical revision notes to the present § 10504 indicate that these words were omitted "as unnecessary because the Commission does not have jurisdiction over safety, collective bargaining, and employee benefit matters, *and those matters are covered by other provisions of title 49 related to the Secretary of Transportation.*" 49 U.S.C. § 10504 (1986 Supp.). While NJT concedes that the jurisdiction of the Interstate Commerce Commission and its rates are not applicable to it because of the express provision of § 10504(b)(2), which exempts

carriers from ICC jurisdiction where the governor of the state approves the carrier's fares, it nevertheless claims that because § 10504(c) refers to employment retirement, annuity, and employment systems or other provisions "related to dealings" between employees and employers—matters collateral to rate regulation—it therefore also should receive all other "benefits" that arise from the Commissioner's rate regulations contained in Part I. One of those benefits, NJT argues, is the overtime exemption which interstate carriers can claim. In order to reach this conclusion, NJT, as I have earlier noted, must claim to be a carrier "subject to the applicable laws of the United States," and one of those applicable laws necessarily must be the rate regulation of the ICA found in Part I.

However, the revision of § 10504(c) clearly indicates that while NJT may be subject to provisions relating to employment retirement, annuity, employment systems and the like, these are matters that are *not* encompassed in the rate regulations of Part I, but rather are found elsewhere in Title 49. If therefore, NJT's theory that it need not pay overtime rates depends upon NJT being subject to the rate regulations of Part I of the ICA, it is obvious that NJT's theory is faulty because both under § 10504(b)(2) and under the 1976 amendment to the ICA it is clear that NJT's rates are *not* regulated by the Interstate Commerce Commission. Thus, any argument relying on the rate provisions of the ICA (Part I) as constituting an "applicable law" to which NJT is subject, is flawed, and such a contention cannot support any claimed exemption from paying overtime rates.

IV.

It defies ordinary principles of statutory construction to argue that § 10504(c), a general savings clause in one statute [The Interstate Commerce Act], should be

construed as negating the effect of a specific provision [for overtime] in another statute [The Fair Labor Standards Act]. Sutherland, *Statutory Construction* at 47.08 (4th Ed. Sands, 1972) (where there is doubt concerning the extent of the application of a proviso on the scope of another statute's operation, the proviso must be strictly construed). More specifically, it is awkward, if not contradictory, to conclude that a general clause [49 U.S.C. § 10504] which in essence narrows the scope of NJT's privilege (immunity from ICC fare regulation) also makes it "subject to" *yet another privilege* (exemption through 29 U.S.C. § 213(b)(2) from the overtime requirements of 29 U.S.C. § 207). As the district court below aptly wrote, NJT would like to interpret § 10504(c) "to mean that 'despite (its) exemption from ICC regulation, it is still governed by laws applicable to railroad employment, including the exemption from the FLSA overtime provisions.'" App. at 17. As I have shown, however, NJT's interpretation must be rejected.

The Fair Labor Standards Act, 29 U.S.C. § 207, establishes the obligation of carriers to pay overtime rates unless the carrier is exempt by virtue of 29 U.S.C. § 213(b)(2), and this exemption can be granted only where the carrier is under ICA jurisdiction. NJT, however, is not under ICA jurisdiction. Therefore, it is § 207 of the Act to which NJT properly is subject. There is no reason why NJT cannot be "subject to applicable laws . . . related to dealings between employees and employers," and thus subject to FLSA overtime rules, and at the same time be excluded from the FLSA overtime exemption, which applies *only* to carriers under the Commerce Commission's jurisdiction.[2] The fact that the ICA regu-

[2] The majority suggests, maj. op., typescript at 6, that the ruling of the court below depended upon a narrow reading of the word "dealings" in the last clause of § 10504(c). This is not the case.

[Continued]

lations contain a provision stating that a transit system [NJT] not covered by ICA railroad fare regulations must still comply with other, non-ICA railroad regulations, does not create contradictions or any ambiguity, as NJT has suggested. To the contrary, the legislation should be given its plain meaning, requiring all commuter rail carriers such as NJT to pay overtime if the carrier has taken advantage of not being rate regulated by the Interstate Commerce Commission.

V.

Recognizing that § 10504 absolves NJT from ICA regulation, that provision nevertheless requires that NJT comply with those laws having to do with (i) safety; (ii) collective bargaining; and (iii) employment retirement, annuity, and employment systems, and other provisions. But each of these obligations springs directly from the applicable laws themselves. *See, e.g.*, 45 U.S.C. § 51 (common carrier liability); 29 U.S.C. § 201 *et seq.* (Fair Labor Standards Act); 45 U.S.C. § 351 (unemployment insurance requirements); and 26 U.S.C. § 3231 (railroad retirement tax requirements). Such obligations are not found in the rate regulatory scheme of Part I of the ICA, as we have pointed out.

Moreover, it adds nothing to the majority's position to argue that because each of these separate obligations originate under acts which require that the carrier be

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[2] [Continued]

Judge Debevoise based his opinion on an expansive view of § 10504, and concluded that the language used in § 10504(c)(3) was meant to refer to broad statutory schemes such as FSLA as a whole. He explored the meaning of "dealings" only as an implausible alternative. App. at 16. Like Judge Debevoise, I do not believe that the grammatical awkwardness of § 10504(c) justifies concentrating on the single phrase "dealings with employees," at the expense of the other terms of the statute. App. at 41. Even if "dealings" is taken in the sense that the majority urges however, NJT would still not have been bound by the ICA, because it was not an "applicable law". *See supra*, dis. op., typescript at 8-9.

subject to ICC jurisdiction, my analysis if accepted would require that NJT no longer be subject to the safety, collective bargaining and employment provisions of § 10504 (c) (3). The short answer to that argument is that NJT be subject to the terms of the Railroad Labor Act, Railroad Retirement Act, and Federal Employer's Liability Act. *See* Dis. Op., typescript at 3, *supra*. Section 10504 (c) (3), however, does not by its terms provide that NJT shall have the § 213 (b) (2) exemption enjoyed by rail carriers under ICC jurisdiction. Thus, the argument made in the majority's opinion (see maj. op., typescript at 10, n.2) falls of its own weight when the text of the relevant statute, § 10504 (c) (3), is examined and given its plain meaning.

NJT suggests that if the district court's interpretation, with which I agree, is correct, 29 U.S.C. § 213 (b) (2) would "appear to be the only statute which is generally applicable to relationships between railroad employees and employers which would not be applicable to NJ Transit . . . [and] these other laws have substantial negative financial and operational impacts on NJ Transit, costing NJ Transit more than twenty million dollars annually and amounting to seventeen percent of its labor costs." Appellant's Brief at 22. This calculation of costs, of course, means little without a corresponding calculation of benefits. In particular, it ignores the benefit of freedom from federal fare regulation that NJT now enjoys. More importantly, NJT wrongly implies that this interpretation of § 10504 (c), rather than the applicable laws themselves, creates the negative financial burden under which NJT claims to suffer. Under the legislative scheme reflected by 49 U.S.C. § 10504 (c), I see nothing unfair in requiring NJT to satisfy its required obligations under the various statutes, including the FLSA. My analysis does no more than refuse to permit NJT to have its cake (be free from ICA rate regulation) and eat it, too (be exempt from overtime payments).

VI.

For these reasons, I would affirm the judgment of the district court. Because the majority rules otherwise, I respectfully dissent.

A True Copy:

Teste:

Clerk of the United States
Court of Appeals for the Third Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil 85-2420

N.J. TRANSIT POLICEMEN'S BENEVOLENT ASSOCIATION, LOCAL 304,

Plaintiff,

v.

NEW JERSEY TRANSIT CORPORATION,

Defendant.

OPINION

October 15, 1985

BEFORE:

HONORABLE DICKINSON R. DEBEVOISE
UNITED STATES DISTRICT JUDGE

Appearances:

(No appearances.)

Introduction

In this action, brought by the New Jersey Transit Policemen's Benevolent Association, plaintiff seeks retroactive and future straight-time and overtime compensation for certain duties performed by New Jersey Transit police officers. Plaintiff brings this action pursuant to 29 U.S.C. Section 207 (the Fair Labor Standards Act), 42 U.S.C. Section 1983, and 45 U.S.C. Section 151(a) (the Railway Labor Act). In addition, plaintiff charges defendant with violating Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e-2(a), as well as the

Fourth, Fifth, and Fourteenth Amendments to the United States Constitution by failing to supply female police officers with lockers and facilities. This matter is now before the court on defendant's motion to dismiss the complaint, or in the alternative, for summary judgment.

Statement of Facts

Plaintiff is a labor organization representing all New Jersey Transit police officers below the rank of captain. These police officers are employed by New Jersey Transit Rail Operation, Inc., a subsidiary of the named defendant, New Jersey Transit Corporation (NJ Transit). NJ Transit is an agency of the State of New Jersey established pursuant to N.J.S.A. 27:25-4.

In the first count of its complaint, plaintiff alleges that on or before January 1, 1983 defendant posted notices and issued regulations informing employees that they were entitled to one and one-half times their regular pay for all hours in excess of 40 worked in one week. According to plaintiff, this notice "informed employees of their rights under the Fair Labor Standards Act (FLSA) and created the official rule and policy of the defendant." Complaint, Paragraph 5. Plaintiff contends that defendant has refused to pay overtime compensation to police officers for mandatory court appearances and in-court testimony when such appearances have compelled the officers to work in excess of 40 hours in one week. Instead, officers are paid at the regular hourly rate for time spent in court. Complaint, Paragraphs 6-8. Plaintiff further alleges that defendant has failed to pay overtime compensation when officers are compelled to work more than forty hours in a week in order to engage in required regular or special training, and that defendant has failed to pay any compensation for mandatory attendance at roll call before the start of a work shift. Complaint, Paragraphs 9-12. Plaintiff contends that defendant's refusal to pay compensation and/or overtime for all time worked

has "deprived Police Officers of property in direct conflict with its own stipulated and posted Rules and Regulations and in direct violation of the Fair Labor Standards Act." Complaint, Paragraph 13. Plaintiff seeks an order requiring defendant to pay, retroactively and in the future, straight compensation for all mandatory work by police officers up to 40 hours a week and compensation at one and one-half times the regular rate for all hours worked in excess of 40 per week.

In the second count of the complaint, plaintiff asserts that defendant employs at least four female police officers and has failed to provide these officers with lockers and other facilities. Plaintiff charges that this failure constitutes a deprivation of the female police officers' rights to privacy and equal protection as secured by the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution, and is in direct violation of Title VII of the Civil Rights Act of 1964. Complaint, Paragraphs 14-16. Plaintiff seeks compensatory and punitive damages and an order requiring defendant to provide such lockers.

Defendant has moved to dismiss plaintiff's complaint on several grounds. As to Count I, defendant first contends that NJ Transit is exempt from the overtime provisions of the Fair Labor Standards Act. Second, defendant argues that plaintiff has failed to state a contract claim for overtime pay upon which it may recover because such a claim is barred by the Eleventh Amendment to the United States Constitution and because exclusive jurisdiction over such a claim lies with the National Railroad Adjustment Board. Finally, defendant claims that plaintiff may not assert a claim pursuant to 42 U.S.C. Section 1983 because NJ Transit is not a person within the meaning of the statute and because due process is served by the contractual and statutory grievance procedures that exist between the parties. As to Count II, defendant argues that plaintiff has failed to state a con-

stitutional claim and has failed to exhaust its administrative remedies which is a prerequisite to bringing suit under Title VII of the Civil Rights Act of 1964.

Discussion

1. *Plaintiff's claims under the Fair Labor Standards Act*

Section 206 of the Fair Labor Standards Act requires an employer to pay wages of not less than $3.35 per hour to its employees. 29 U.S.C. Section 206. Section 207 provides that an employee who works in excess of a forty-hour week must be compensated for the hours in excess of 40 "at a rate not less than one and one-half the regular rate at which he is employed." 29 U.S.C. Section 207(a)(1). Defendant contends that it is not subject to the overtime provisions of the FLSA because section 213 (b)(2) of that Act specifically exempts from the overtime provisions "any employee of an employer engaged in the operation of a common carrier by rail and subject to the provisions of Part I of the Interstate Commerce Act (49 U.S.C. Section 1 *et seq.*)."

Defendant asserts that it is a common carrier by rail as defined in 49 U.S.C. Section 10102(4) and (19). However, defendant is exempted from the provisions of Part I of the Interstate Commerce Act under 49 U.S.C. Section 10504(b). That section provides that the Interstate Commerce Commission (ICC) does not have jurisdiction over rail mass transportation systems provided by a local public body if fares set by such a local public body are subject to approval by the Chief Executive Officer of the state in which the services are provided. Defendant NJ Transit meets this test as it has the authority to set fares subject to the Governor's veto. N.J.S.A. 27:25-1 *et seq.*

Defendant contends that although it is exempt from ICC regulation, the provision excluding rail common carriers from the overtime provisions of the FLSA still ap-

plies to it. Defendant relies on 49 U.S.C. Section 10504 (c) which provides that a local public body exempt from ICC jurisdiction under Section 10504(b)

> is subject to applicable laws of the United States related to—
>
> (1) safety;
>
> (2) the representation of employees for collective bargaining; and
>
> (3) employment retirement, annuity, and unemployment systems related to dealings between employees and employers.

Therefore, defendant argues that while it is exempt from ICC regulation, it is still subject to all laws regarding railroad employment including 29 U.S.C. Section 213 (b)(2), the statutory exemption for rail carriers from the FLSA.

In its response to defendant's argument, plaintiff does not address Section 10504(c) directly. (Plaintiff concedes that its discussion of the applicability of Section 213(b)(2), relying on the Northeast Rail Service Act of 1981, 45 U.S.C. Sections 1101-1116, is an unintentional "misnomer." See Plaintiff's Letter, 9/9/85.) Instead, plaintiff argues that this issue is controlled by the recent United States Supreme Court decision, *Garcia v. San Antonio Metropolitan Transit Authority*, 83 L. Ed. 2d 1016 (1985), in which the Court overruled *National League of Cities v. Usery*, 426 U.S. 833 (1976).

In *Garcia* the Supreme Court held that the San Antonio Metropolitan Transit Authority (SAMTA), a public mass-transit authority organized on a countywide basis, is subject to the minimum wage and overtime requirements of the FLSA. The Court first reviewed the history of the FLSA as applied to mass-transit employees:

> When the FLSA was enacted in 1938, its minimum-wage and overtime provisions did not apply to local mass-transit employees or, indeed, to employees of state and local governments. Sections 3(d), 13(a)(9), 52 Stat. 1060, 1067. In 1961, Congress extended minimum-wage coverage to employees of any private mass-transit carrier whose annual gross revenue was not less than $1 million. Fair Labor Standards Amendments of 1961, Sections 2(c), 9, 75 Stat. 65, 61. Five years later, Congress extended FLSA coverage to state and local-government employees for the first time by withdrawing the minimum-wage and overtime exemptions from public hospitals, schools, and mass-transit carriers whose rates and services were subject to state regulation. Fair Labor Standards Amendments of 1966, Sections 102(a) and (b), 80 Stat. 831. At the same time, Congress eliminated the overtime exemption for all mass-transit employees other than drivers, operators, and conductors. Section 206(c), 80 Stat. 836. The application of the FLSA to public schools and hospitals was ruled to be within Congress' power under the Commerce Clause. *Maryland v. Wirtz*, 392 U.S. 183 (1968).
>
> The FLSA obligations of public mass-transit systems like SATS were expanded in 1974 when Congress provided for the progressive repeal of the surviving overtime exemption for mass-transit employees. Fair Labor Standards Amendments of 1974, Section 21(b), 88 Stat. 68. Congress simultaneously brought the States and their subdivisions further within the ambit of the FLSA by extending FLSA coverage to virtually all state and local-government employees. Sections 6(a)(1) and (6), 88 Stat. 58, 60, 29 U.S.C. Sections 203(d) and (x).

83 L.Ed.2d 1016, 1022 (1985).

Next, the Court reviewed *National League of Cities* and cases decided under it and rejected as unsound "a rule of

state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is 'integral' or 'traditional'." *Id.* at 1031. The Court recognized

> that the states occupy a special and specific position in our constitutional system and that the scope of Congress' authority under the Commerce Clause must reflect that position. But the principal and basic limit on the federal commerce power is that inherent in all congressional action—the built-in restraints that our system provides through state participation in federal governmental action.

Id. at 1037. Accordingly, the Court held that "Congress' action in affording SAMTA employees the protection of the wage and hour provisions of the FLSA contravened no affirmative limit on Congress' power under the Commerce Clause." *Id.*

A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1967). *Garcia* clearly demonstrates that Congress has the power under the Commerce Clause to apply the minimum wage and overtime provisions of the FLSA to defendant NJ Transit. For defendant to prevail on its motion to dismiss plaintiff's claims under FLSA, it must be demonstrated that Congress has exempted defendant from the FLSA, or, if defendant is subject to FLSA that it is beyond doubt that plaintiff can prove no violations which would entitle it to relief.

I deal at the outset with plaintiff's claim that it is not being paid any compensation for mandatory attendance at roll call. Although plaintiff's complaint does not invoke 29 U.S.C. Section 206 in the jurisdictional section, it does refer to a violation of the "Fair Labor Standards Act" in Section 13 for defendant's alleged refusal to pay compen-

sation for all time worked. 29 U.S.C. Section 206(a) requires every employer of an employee engaged in commerce to pay wages of not less than $3.35 an hour. *Garcia* discussed the broad applicability of this rule to mass-transit authorities, and Congress has not exempted them from it in Section 213(a) which lists some 18 exemptions from the minimum wage law. Defendant does not address this claim in its motion to dismiss. It does not argue that plaintiff can prove no facts in support of its claim or that defendant is somehow exempt from Section 206. Accordingly, I deny defendant's motion to dismiss FLSA claims brought under Section 206.

Defendant moves in the alternative for summary judgment on this claim. In order to prevail on a motion for summary judgment, the moving party must prove that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56. A motion for summary judgment may only be granted if there are no remaining issues for material fact which, if believed by the trier of fact, would justify a finding for the party opposing that judgment. *Bryson v. Brand Insulation, Inc.*, 621 F.2d 556, 559 (3d Cir. 1980). All evidence submitted must be viewed in a light most favorable to the party opposing the motion. *Wahl v. Rexnord*, 624 F.2d 1169, 1181 (3d Cir. 1980). However, the opposing party may not rest upon the mere allegations or denials of his pleadings, but his response must set forth specific facts showing a genuine issue for trial. *Delong Corp. v. Raymond International, Inc.*, 622 F.2d 1135, 1139 (3d Cir. 1980).

The only information before this Court on the issue of straight-time compensation is plaintiff's allegation that defendant refuses to pay any compensation for mandatory roll call attendance. Since I can find no evidence submitted by either party on this issue, I find it inappropriate to rule on a motion for summary judgment at this time.

Count I of the complaint also alleges a violation of the overtime provisions of the FLSA. Defendant relies heavily on 49 U.S.C. Section 10504(c) in arguing that it is exempt from the rule on overtime compensation. In particular, defendant contends that by subjecting it "to applicable laws of the United States relating to . . . dealings between employees and employers," Section 10504(c) makes applicable to it the exemption from the FLSA.

"Exemptions from the Fair Labor Standards Act are to be narrowly construed against the employer. The burden of proof is on the employer to establish an exemption." *Guthrie v. Lady Jane Collieries, Inc.*, 722 F.2d 1141, 1143 (3d Cir. 1983) (citations omitted). With that in mind I note that a careful reading of Section 10504(c) and its predecessor indicates that it does not refer to the statutory exemption of the FLSA.

The original version of Section 10504(c) can be found at Section 804 of the Railroad Revitalization and Reform Act of 1976, P.L. 94-210, 90 Stat. 139. Section 804, in essence, contained both of the present sections 10504(b) and (c) in that it exempted local public bodies which provide mass transportation services from the Interstate Commerce Act (ICA) but continued to make them subject to applicable federal laws pertaining to safety, representation of employees, and employment retirement, annuity, and unemployment systems. This new rule and qualifier was added as Section 304(j) to the Regional Rail Reorganization Act of 1973 (the former 45 U.S.C. 744(j)). The exemption was later narrowed to apply to rail carriers whose authority to regulate fares was subject to the veto power of the governor of the state. Rail Transportation Act, Section 206, P.L. 94-555, 90 Stat. 2621.

Basically, the exemption and qualifier together reflected a judgment of Congress that federal regulation by the ICC of a local public rail carrier subject to the control of a state's governor was unnecessary. However, in allowing the states to regulate ICC-related matters concerning fares,

services, and other issues, Congress made clear it did not intend to give the states jurisdiction over the other applicable federal areas concerning employment. The language used by Congress in identifying such "applicable laws of the United States" refers to broad statutory schemes—"safety; the representation of employees for collective bargaining; and employment retirement, annuity, and unemployment systems or other provisions related to dealings between employees and employers"—not to narrowly tailored specific exemptions from statutory schemes. As such, section 10504(c) should be read to subject defendants like NJ Transit to the provisions of the FLSA as an entirety, not to a specific exemption to the FLSA made inapplicable by Section 10504(b). Defendant interprets Section 10504(c) to mean that "despite (its) exemption from ICC regulation, it is still governed by laws applicable to railroad employment, including the exemption from the FLSA overtime provisions." Defendant's Brief, at 5. Instead, this conclusion should state "despite its exemption from ICC regulation, defendant is governed by laws applicable to railroad employment, including the FLSA overtime provisions."

Section 10504(c) can also be read more narrowly as subjecting defendant to provisions of Title 49 *other* than the ICA, Part I, and not to statutes recorded in other Titles of the United States Code. This interpretation, as well, does not bring defendant within the statutory exemption to the FLSA since 29 U.S.C. Section 213(b)(2) exempts from the overtime rule of the FLSA employees of rail carriers who are "subject to the provisions of Part I of the ICA. (49 U.S.C. Section 1 *et seq.*)." (This reference is to the ICA as it was codified prior to 1978. Today Part I of the ICA is contained within Subtitle IV of Title 49, and Subtitle IV is the entire Interstate Commerce Act.)

The legislative history of Section 10504(c) indicates that the phrase "applicable laws" refers to other provi-

sions of Title 49, but not to provisions of the ICA. This can be seen by comparing Section 10504(b) and (c) with its predecessor, 45 U.S.C. 744(j)(1) which read as follows:

> (1)(A) *Except as provided in subparagraph (B) of this paragraph,* no local public body which provides mass transportation services by rail, and which is otherwise subject to the Interstate Commerce Act shall, with respect to the provision of such services, be subject to the Interstate Commerce Act or to rules, regulations, and order promulgated under such Act, if the interstate fares, or the ability to apply to the Interstate Commerce Commission for changes thereto, of such local public body is subject to approval or disapproval by a Governor of any State in which it provides services.
>
> (B) Any local public body described in subparagraph (A) of this paragraph shall continue to be subject to applicable Federal laws pertaining to (i) safety, (ii) the representation of employees for purposes of collective bargaining, and (iii) employment retirement, annuity, and unemployment systems or any other provision pertaining to dealings between employees and employers."

(Emphasis added.) Congress mistakenly omitted Section 304(j)(1)(B) from the restatement of Subtitle IV of Title 49, Interstate Commerce, but when it added the section it deleted the words "except as provided in subparagraph (B) of this paragraph." The current historical and revision notes to Section 10504 indicate these words were omitted "as unnecessary because the (ICC) does not have jurisdiction over safety, collective bargaining, and employee benefit matters and those matters are covered by other provisions of Title 49 related to the Secretary of Transportation.: 49 U.S.C. 10504 (1983 Supp. Pamphlet). By its own words, Congress was cor-

recting any erroneous inferences drawn from its earlier statute that local mass transit bodies like defendant were still subject to some rules of the ICA. Instead, Congress was referring to matters covered by provisions of Title 49 other than the ICA. Consequently, it cannot be said that 49 U.S.C. Section 10504(c) revives the FLSA's statutory exemption. Section 10504(b) and (c) provide that defendant, while subject to applicable federal laws other than the ICA, is not subject to the ICA. As such, defendant does not qualify for the FLSA's exemption that covers employees of rail carriers who are subject to Part I of the ICA.

Defendant also points out that Congress has defined the scope of several Acts by reference to the ICA: Railway Labor Act, 45 U.S.C. Section 151 (First) defines "carrier" to include a carrier by railroad subject to the ICA; Railroad Unemployment Insurance Act defines "employer" by reference to "carrier," 45 U.S.C. Section 351(a), and defines "carrier" by reference to the ICA; Railroad Retirement Act defines "employer" as a "carrier", 26 U.S.C. Section 3132(a), and defines "carrier" by reference to the ICA. Defendant, therefore, argues that 49 U.S.C. Section 10504(c) demonstrates Congress was not changing the scheme of laws governing railroad labor relations by exempting local public rail mass transportation from the ICC, and that defendant, therefore, remained exempt from FLSA's overtime provision despite Section 10504(b).

I find that defendant cannot claim the FLSA's statutory exemption from the overtime rules notwithstanding this argument. Section 10504(c) was intended to deal precisely with the examples defendant cites. It provides that applicable federal laws relating to collective bargaining, like the Railway Labor Act, or unemployment, like the Railroad Unemployment Insurance Act, shall not be affected by Section 10504(b)'s exemption from the ICC. However, 29 U.S.C. Section 213(b)(2) does not simply refer to the ICC for definitional purposes. It

lists being subject to the ICA and its regulatory powers as a condition for exemption from Section 207 of the FLSA. Therefore, it is rightfully treated differently from the statutes defendant cites.

Defendant also contends that *Garcia* does not apply the FLSA to rail mass transportation. Defendant distinguishes *Garcia* on three grounds arguing: first, *Garcia* dealt with a bus system not a commuter rail operation; second, in ruling that the Tenth Amendment did not bar FLSA application to state operated bus service, the Court was not discussing the applicability of the FLSA to railroads since it had already ruled that the Tenth Amendment did not prohibit the application of the Railway Labor Act to railroads in *United Transportation Union v. Long Island Rail Road Co.*, 455 U.S. 678 (1982). (*United Transportation Union* held that the operation of a railroad engaged in interstate commerce was not an integral part of traditional state activities generally immune from federal regulation); and, finally, *Garcia*'s discussion of the history of the FLSA's application to mass transit discussed the repeal of an exemption for motor bus carriers, 29 U.S.C. Section 213 (a)(9), but not the exemption for railroads, 29 U.S.C. Section 213(b)(2).

While I do not rely on *Garcia* in finding the FLSA applicable to defendant, I note that defendant's narrow reading of the case obscures its message. While it is true that SAMTA was operating a bus system, the Court consistently refers to it as a mass-transit authority. Had the Court thought the distinction between bus and rail mass transit significant, it would not have spoken in general terms. Instead, the Court discusses the history of FLSA with regard to "mass-transit" employees and carriers, at 1022, and it focuses on the "status of public mass transit" and "Congress treatment of public mass transit" in support of its conclusions on state sovereignty. *Id.* at 1036, 1037. The Court does not

specifically confine its discussion on the applicability of the FLSA to mass transit by bus alone. Moreover, although *United Transportation Union* resolved that railroads were not immune from federal regulation thereby arguably removing that issue from the Court's concern in *Garcia*, *United Transportation Union* contains much language in support of uniform federal regulation of railroads. In ruling on the Railway Labor Act, it held that:

> to allow individual states, by acquiring railroads, to circumvent the federal system of railroad bargaining, *or any of the other elements of federal regulation of railroads*, would destroy the uniformity thought essential by Congress and would endanger the efficient operation of the interstate rail system.

455 U.S. 678, 689 (1978) (Emphasis added). *United Transportation Union*, thus, does not offer direct support for restricting the application of the FLSA to mass transit authorities. Finally, the FLSA exemption repealed by Congress which the Court noted in *Garcia* covered both motor bus carriers as well as electric railways, and it dealt with the minimum wage laws, not the overtime provisions of the FLSA.

Since I find that defendant is not exempt from the overtime provisions of the FLSA under 29 U.S.C. Section 213(b)(2), I am unable to find that plaintiff can prove no set of facts which would entitle it to relief. Accordingly, defendant's motion to dismiss the overtime claims grounded in the FLSA is denied.

Defendant moves, in the alternative, for summary judgment on these claims. However, defendant does not contest plaintiff's allegations that its members do not receive overtime compensation when they are compelled to work more than 40 hours in a week in order to make mandatory court appearances, engage in required training, or attend roll call. Additionally, plaintiff acknowl-

edges in its brief that it posted the standard notice printed by the United States Department of Labor regarding minimum wage, overtime, and child labor laws. But once again, neither party has submitted any evidence on these issues. I therefore find it inappropriate to rule on a motion for summary judgment at this time.

I note in passing that the Eleventh Amendment does not bar plaintiff's FLSA claims. Pursuant to the Eleventh Amendment, "an unconsenting state is immune from suits brought in federal courts by her own citizens as well as by citizens of another state." *Pennhurst State School and Hospital v. Halderman*, 79 L.Ed 2d 67, 78 (1984). It is well settled that defendant NJ Transit Corporation is an agency or alter ego of the State of New Jersey. *Gibson-Homans Co. v. New Jersey Transit Corp.*, 560 F.Supp. 110, 113 (1982); *Saddle River Tours v. New Jersey Department of Transportation*, Civ. No. 83-1776 (D.N.J., Oct. 31, 1983); *Hightower v. New Jersey Transit Rail Operations, Inc.*, Civ. No. 84-1268 (D.N.J. Aug. 27, 1984). However, the Supreme Court held in *Parden v. Terminal Railway* that a state consented to suit by operating a railroad in interstate commerce after the enactment of the Federal Employer's Liability Act which authorizes suits against state-owned common carriers by rail. 377 U.S. 184 (1964). Defendant here is operating a rail carrier engaged in interstate commerce after the enactment of the FLSA which provides that:

> Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. . . An action to recover the liability prescribed . . . . may be maintained against any employer (including a public agency) in any Federal or State court of

> competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated.

29 U.S.C. Section 216(b). Accordingly, defendant is not an unconsenting state entitled to immunity from suit under the Eleventh Amendment.

2. *Contractual claims for compensation*

Paragraph 5 of the complaint in this action alleges

> defendant posted notices and issued regulations to indicate that all employees were entitled to a minimum of one and one half times the regular rate of pay for all hours over 40 worked in one week. This notice informed employees of their rights under the Fair Labor Standards Act, and created the official rule and policy of the defendant.

Paragraph 13 goes on to allege that defendant, by refusing to pay overtime compensation, "has deprived Police Officers of property in direct conflict with its own stipulated posted Rules and Regulations, and in direct violation of the Fair Labor Standards Act."

With respect to these allegations, defendant argues extensively in its papers that plaintiff has not stated a contract claim upon which it may recover for overtime pay. It contends that the Eleventh Amendment bars such a claim and that the National Railroad Adjustment Board would have exclusive jurisdiction over it. Plaintiff, however, has not claimed a breach of contract in its complaint. Neither do Paragraphs 5 and 13 make out the elements of a contractual claim. Moreover, plaintiff does not argue in support of or even make reference to any contractual claims in its brief responding to defendant's lengthy refutation of contractual claims. Instead, plaintiff concentrates solely on its FLSA claims in its discussion of the Eleventh Amendment and the National Railroad Adjustment Board.

It is noteworthy that there is no signed collective bargaining agreement between the parties. The parties have been acting pursuant to an unratified agreement reached between defendant and the Teamsters, the representative for NJ Transit policemen before defendant was certified by the National Mediation Board on August 23, 1983. Baker Affidavit Paragraphs 2, 4, 6.

Since plaintiff is not seeking relief based on a contractual theory, I need not rule on defendant's motion to dismiss or grant summary judgment on hypothetical contract claims. In so acting, I make no comment on the effects the Eleventh Amendment or the Railway Labor Act, 45 U.S.C. Section 151 *et seq.* would have on any contract claims actually brought against defendant.

3. *Plaintiff's claim under 42 U.S.C. Section 1983 for deprivation of property*

Paragraph 13 of the complaint alleges that defendant's failure to pay overtime compensation constitutes a deprivation of property. Since plaintiff cites 42 U.S.C. Section 1983 in its jurisdictional statement, it appears that plaintiff is claiming defendant's refusal to pay overtime compensation for certain work constitutes a taking of property without due process in violation of 42 U.S.C. Section 1983.

When a state is named as a defendant in a Section 1983 action there are two impediments to suit: first, the Eleventh Amendment bars suits against a state, and second, a state is not a person as required under Section 1983. *Rochester v. White*, 503 F.2d 263, 266 (3d Cir. 1974). Defendant contends that its status as alter ego of the state makes it immune from a civil rights action by virtue of the Eleventh Amendment. Further, defendant argues that just as a state is not a person, a state agency or arm of the state is not a person within the meaning of Section 1983. Lastly, defendant maintains

that if it is subject to suit under Section 1983, there has been no deprivation of property without due process given the contractual and statutory grievance proceedings available to plaintiff.

Plaintiff apparently concedes that it cannot maintain an action under 42 U.S.C. Section 1983 since its brief did not contain any arguments contesting defendant's points. Defendant properly points out that a state is not a "person" within the meaning of Section 1983. Likewise, a state agency is not a "person" and may not be sued under Section 1983. *See Thompson v. Burke*, 556 F.2d 231, 232 (3d Cir. 1977) (Pa. Board of Pardon and Parold not a person); *Curtis v. Everette*, 489 F.2d 516, 521 (3d Cir. 1973) (Pa. Bureau of Corrections not a person); *Fisher v. Cahill*, 474 F.2d 991, 992 (3d Cir. 1973) (N.J. Prison Medical Department not a person); *Bennun v. Board of Governors of Rutgers*, 413 F. Supp. 1274, 1280 (D.N.J. 1976) (Board of Governors of State University not a person). Since defendant NJ Transit is an alter ego of the state, a Section 1983 action may not be maintained against it. Accordingly, plaintiff's Section 1983 claim is dismissed. I need not rule on defendant's other arguments to dismiss this claim.

4. *Plaintiff's claims alleging employment discrimination*

Count II of the complaint alleges defendant has generally failed to supply lockers or comparable facilities to its four female police officers in violation of their rights to privacy and equal protection under the Fourth, Fifth and Fourteenth Amendments to the United States Constitution, and in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e-2(a). Complaint, Paragraphs 14-16.

Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e *et seq.*, makes it an unlawful employment practice for an employer to discriminate against any in-

dividual with respect to conditions or privileges of employment or to limits his or her employees in any way which would deprive them of employment opportunities because of their sex. Title VII also "specifies with precision the jurisdiction prerequisites that an individual must satisfy before he is entitled to institute a law suit" in federal court. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974). In *Alexander* the Supreme Court noted that these prerequisites are met when a petitioner "(1) file(s) timely a charge of employment discrimination with the (Equal Employment Opportunnity) Commission, and (2) receive(s) and act(s) upon the Commission's statutory notice of the right to sue. 42 U.S.C. Section 2000e-5(b), (e), and (f)." *Id.*

Defendant has submitted an affidavit by James S. Baker, Director of Labor Relations for NJ Transit, which states that no employment discrimination charges filed with the Equal Employment Opportunity Commission have been served on defendant by plaintiff relating to locker facilities for female police officers. Baker Affidavit, Paragraph 7. Plaintiff does not contest this claim. Consequently, I find that plaintiff has not fulfilled the requirements for pursuing a Title VII claim in federal court and I dismiss without prejudice the claims brought under Title VII since they are not properly before me at this time.

I turn now to plaintiff's attempt to maintain a direct action for employment discrimination under the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution. At the outset I note plaintiff has failed to make out a cause of action under the Fourth Amendment. Plaintiff also fails to identify its claim under the Fifth Amendment, as applied to the states by the Fourteenth Amendment; presumably it is alleging defendant NJ Transit's discriminatory actions amount to a deprivation of property without due process and a violation of the equal protection clause. Yet, all plaintiff alleges is

that defendant "has *generally* failed to supply female Officers with any lockers or comparable facilities." Complaint, Paragraph 15. (Emphasis added.) Plaintiff offers no further support or affidavits on this issue. Neither does it dispute the information contained in the affidavit of Joseph Slawsky, defendant's Director of Police, who maintains that all four female police officers work in either Newark's newly renovated Penn Station, which has separate locker facilities for women, or Newark's Broad Street Station, where current renovations include the construction of separate locker facilities. Mr. Slawsky also indicates that renovations are planned for the Long Branch and Hoboken Terminals where no women police officers are employed. Slawsky Affidavit, Paragraphs 4-5. Plaintiff has not submitted evidence showing women police officers are being deprived of promotions or transfers because of defendant's actions or that they are currently suffering from disparate locker facilities. In fact, plaintiff relies on the mere allegations of its pleadings and does not set forth specific facts showing a genuine issue for trial. Accordingly, defendant's motion for summary judgment is granted. In making this ruling I do not discuss Eleventh Amendment problems posed by certain elements of relief plaintiff requests.

Plaintiff alleges no violations of the New Jersey Constitution or state law in its complaint. Yet, plaintiff argues in its brief that it may pursue state law claims without exhausting any administrative remedies, and that this Court should exercise pendent jurisdiction over such claims. Since this suit has been brought against an instrumentality of the state, however, a federal court may not award retroactive relief against defendant under *Edelman v. Jordan*, 415 U.S. 651 (1974) and may not award injunctive relief on the basis of state law claims under *Pennhurst*, supra. Therefore, I find plaintiff' state law claims for employment discrimination, which are not properly before the Court, cannot be heard under the doctrine of pendent jurisdiction.

Conclusion

For the reasons stated above, defendant's motion to dismiss the FLSA claims for straight-time and overtime compensation is denied. I find it inappropriate to rule on defendant's motion for summary judgment on these issues at this time, and that motion, therefore, will be denied without prejudice. Defendant's motion to dismiss the Section 1983 claim is granted. I also grant defendant's motion to dismiss the Title VII and Fourth Amendment claims, and I grant summary judgment for defendant on the remaining employment discrimination claims.

Counsel for defendant is requested to submit an appropriate form of order.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 85-2420 DRD

N.J. TRANSIT POLICEMEN'S
BENEVOLENT ASSOCIATION, LOCAL 304,
Plaintiff,

v.

NEW JERSEY TRANSIT CORPORATION,
Defendant.

[Filed Nov. 13, 1985]

ORDER

This matter having been opened to the Court by Irwin I. Kimmelman, Attorney General of New Jersey, attorney for defendant New Jersey Transit Corporation (Robert H. Stoloff, Deputy Attorney General, appearing), upon the motion of said defendant to dismiss the complaint, in the presence of Alfred G. Osterweil, Esq., attorney for defendant, N.J. Transit Policemen's Benevolent Association, Local 304, and the Court having considered the briefs, affidavits and oral argument of the parties, for the reasons set forth in an opinion dictated on the record on October 15, 1985,

IT IS ORDERED on this 12th day of November, 1985 that:

1) With respect to the claim in the First Count brought under the Fair Labor Standards Act the

motion to dismiss, or in the alternative for summary judgment, is denied without prejudice;

2) With respect to the claim in the First Count brought under 42 *U.S.C.* § 1983 the motion to dismiss is granted;

3) With respect to the claim in the Second Count brought under 42 *U.S.C.* § 2000e-2(a) and the Fourth Amendment to the United States Constitution the motion is dismissed; and

4) With respect to the remaining claims in the Second Count the motion for summary judgment is granted.

The Court is of the opinion that the Order denying the motion to dismiss the claims brought under the Fair Labor Standards Act involves a controlling question of law as to which there is substantial ground for difference of opinion and an immediate appeal from the order may advance the ultimate termination of the litigation.

/s/ Dickinson R. Debevoise
DICKINSON R. DEBEVOISE
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD DISTRICT

No. 86-5259

N.J. TRANSIT POLICEMEN'S BENEVOLENT ASSOCIATION LOCAL 304

vs.

NEW JERSEY TRANSIT CORPORATION,
Appellant

SUR PETITION FOR REHEARING

BEFORE: GIBBONS, *Chief Judge*, SEITZ, WEIS, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, and GARTH, *Circuit Judges*

The petition for rehearing filed by appellee in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Judge Garth would have granted panel rehearing in this matter.

By the Court,
/s/ Walter K. Stapleton
Circuit Judge

Dated: Jan. 27, 1987

UNITED STATES COURT OF APPEALS
FOR THE THIRD DISTRICT

No. 86-5259

N.J. TRANSIT POLICEMEN'S
BENEVOLENT ASSOCIATION LOCAL 304

vs.

NEW JERSEY TRANSIT CORPORATION,
Appellant

(D.N.J. Civil No. 85-2470)

On Appeal from the United States District Court
for the District of New Jersey—Newark

Present: Adams and Stapleton, *Circuit Judges* and Garth, *Senior Circuit Judge*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel September 16, 1986.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered November 14, 1985, as certified to this Court pursuant to 28 U.S.C. § 1292(b), be and the same is hereby vacated and the cause remanded so that the said

District Court may enter an order consistent with the opinion of this Court. Each party to bear its own costs.

ATTEST:

/s/ ——— ———

Certified as a true copy and issued in lieu of a formal mandate on February 9, 1987

Test: /s/ M. Elizabeth Ferguson

Chief Deputy Clerk, United States Court of Appeals for the Third Circuit

December 2, 1986